



**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
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VIA EMAIL

August 9, 2021

Lilian Dorka
Director, External Civil Rights Compliance Office
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Ave., NW
Washington, D.C. 20460
Dorka.Lilian@epa.gov

Re: TDEC's Response to EPA Complaint No: 03R-21-R4

Dear Director Dorka:

The recipient, State of Tennessee, Department of Environment and Conservation (TDEC), submits this response to the complaint no: 03R-21-R4 ("Complaint") that the Southern Environmental Law Center (SELC) filed with the United States Environmental Protection Agency (EPA)'s External Civil Rights Compliance Office (ECRCO) on behalf of Memphis Community Against Pollution, Inc. (MCAP) on May 16, 2021. The Complaint alleges that TDEC violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 ("Title VI"), as well as the EPA's Title VI implementing regulations in 40 C.F.R. Part 7, by issuing an Aquatic Resource Alteration Permit (ARAP) and Section 401 Certification (collectively "Permit") for the Byhalia Connection Pipeline ("Pipeline"). SELC contends that the Permit will result in unjustified disparate adverse impacts against African Americans, based on race. ECRCO has accepted for investigation the following two issues:

1. Whether TDEC discriminated on the basis of race in violation of the Civil Rights Act of 1964 (Title VI) and EPA's nondiscrimination regulation at 40 C.F.R. Part 7, when TDEC issued Aquatic Resource Alteration Permit and Section 401 Certification NRS20.089 for the Byhalia Connection Pipeline on November 17, 2020; and

2. Whether TDEC has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to TDEC's services, programs, and activities, for individuals with limited English proficiency and individuals with disabilities, and whether TDEC has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.1.

The Permit was relinquished and revoked on July 28, 2021.¹ Accordingly, the Complaint's request for revocation of the Permit is moot.

INTRODUCTION AND SUMMARY OF TDEC'S POSITION

TDEC is charged with protecting the health of Tennessee's citizens and its environment, including promoting environmental equity in the administration of its programs and services. It does this through a robust Title VI program, strict adherence to its permitting statutes and regulations for all permits regardless of demographics, and a meaningful public engagement process.

TDEC's Title VI program properly implements the procedural safeguards required under 40 C.F.R. Parts 5 and 7. TDEC acted within the bounds of its limitations and obligations to all stakeholders in issuing the Permit, and did not discriminate in the issuance of the Permit, or in its ARAP program more generally. SELC failed to present *any* evidence of such discrimination in its Complaint. TDEC issued approximately 7,033 ARAPs between January 1, 2011, and June 30, 2021. The large majority of these ARAPs are for aquatic impacts that are *not* located in communities with significant populations of persons protected by Title VI. TDEC has issued ARAPs for aquatic impacts associated with a total of 17 oil and gas pipelines, including two issued after the Permit, both of which are located in predominantly White counties.

FACTUAL BACKGROUND

I. Overview of TDEC and the Division of Water Resources

a. TDEC

TDEC is a State of Tennessee executive agency created under Tennessee Code Annotated section 4-3-501. It is headquartered in Nashville, Tennessee, in the William R. Snodgrass Tennessee Tower at 312 Rosa L. Parks Avenue, 37243. David W. Salyers, P.E., is the commissioner of TDEC. Tennessee Code Annotated section 4-3-502 states that TDEC is "under the charge and general supervision of the commissioner of environment and conservation."

TDEC exists to enhance the quality of life for citizens of Tennessee and to be trustees of its natural environment by:

¹ Ex. 1 - Byhalia Permit Documents, at 345-48.

- Protecting and improving the quality of Tennessee’s air, land, and water through a responsible regulatory system;
- Protecting and promoting human health and safety;
- Conserving and promoting natural, cultural, and historic resources; and
- Providing a variety of quality outdoor recreational experiences.²

TDEC is committed to providing a cleaner, safer environment, thus promoting economic prosperity and increased quality of life in Tennessee.³ TDEC performs its mission by managing regulatory programs that maintain standards for air, water, and soil quality while providing assistance to businesses and communities in areas ranging from recreation to waste management.⁴ TDEC also manages the Tennessee state park system and programs to inventory, interpret, and protect Tennessee’s rich natural, historical, and archeological heritage.⁵

TDEC operates some of its regulatory programs under federal delegations of authority in the form of either delegated program authority or authority provided pursuant to formal agreements from EPA, the Department of Energy, the Department of Defense, the Nuclear Regulatory Commission, and the Food and Drug Administration.⁶ These provisions of authority relate to the federal Clean Air Act; Clean Water Act; Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act; Safe Drinking Water Act; Atomic Energy Act of 1954; and the Mammography Quality Standards Act.⁷

Tennessee Code Annotated section 4-3-503 authorizes TDEC’s commissioner to establish divisions, bureaus, or other organizational units to fulfill the duties of the department.⁸ TDEC services are delivered primarily through two bureaus, the Bureau of Environment (BOE) and the Bureau of Parks and Conservation.⁹ Bureaus are organized into divisions and are led by deputy commissioners who report to Commissioner Salyers.¹⁰ The appointed deputy commissioner for the Bureau of Environment is Greg Young.

The Complaint involves the ARAP permitting and regulatory activities of TDEC’s Division of Water Resources (DWR).

b. DWR

DWR, under the direction of Jennifer Dodd, is the largest division within BOE and has far-ranging responsibilities for the protection of the quality of waters of the state of Tennessee, including both surface water and groundwater.¹¹

² Ex. 2 - TDEC Title VI Compliance Report and Implementation Plan Fiscal Year 2019-2020 (rev. Feb. 2021), at 4.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Tenn. Code Ann. § 69-3-103(44) (defining waters to include “any and all water, public or private, on or beneath the surface of the ground, that are contained within, flow through, or border upon Tennessee or any portion thereof, except

DWR implements the National Pollutant Discharge Elimination System (NPDES) program in Tennessee pursuant to a delegation of authority from EPA.¹² DWR also implements Tennessee's water quality criteria,¹³ the total maximum daily load (TMDL) program, and the section 305(b) program.

DWR implements the Safe Drinking Water Act, ensuring the quality of drinking water for all Tennesseans served by public water supplies.¹⁴ In addition, DWR protects the quality of groundwater across Tennessee. DWR regulates underground injection, septic systems, land application and reuse of wastewater, and construction of drinking water wells.¹⁵

DWR operates Tennessee's state revolving fund (SRF) loan program in conjunction with the Tennessee Local Development Authority.

DWR implements the Tennessee Water Quality Control Act of 1977 (the "Act").¹⁶ The Act provides that all waters of Tennessee are the property of the state and are held in public trust for the use of the people of Tennessee.¹⁷ The Act further provides that the people of Tennessee have a right to unpolluted waters and charges state government with the duty to take all prudent steps to secure, protect, and preserve this right.¹⁸ The Act establishes a range of permit requirements, including the requirement to obtain an ARAP.¹⁹

c. The ARAP Program

ARAPs are state permits that authorize habitat alterations and water withdrawals in accordance with permit conditions to protect water quality. Tennessee implements its Clean Water Act Section 401 Certification process through the ARAP program.²⁰ The ARAP program is governed by two sets of rules: the ARAP rules²¹ and Tennessee's Water Quality Criteria,²² including the Antidegradation Statement.²³

bodies of water confined to and retained within the limits of private property in single ownership that do not combine or effect a junction with natural surface or underground waters").

¹² Tenn. Code Ann. § 69-3-102(c); -108(b); Tenn. Comp. R. & Regs. Chapters 0400-40-05 and -10.

¹³ Tenn. Comp. R. & Regs. Chapters 0400-40-03 (criteria) and -04 (use classifications).

¹⁴ Tenn. Code Ann. §§ 68-221-701 to -720.

¹⁵ Tenn. Code Ann. § 69-3-108(b)(8); Tenn. Comp. R. & Regs. Chapter 0400-45-06.

¹⁶ Tenn. Code Ann. §§ 69-3-101 to -148. The Tennessee Board of Water Quality, Oil, and Gas has rulemaking and contested case authority under the Act.

¹⁷ Tenn. Code Ann. § 69-3-102(a).

¹⁸ *Id.*; Tenn. Code Ann. § 69-3-102(b).

¹⁹ Tenn. Code Ann. § 69-3-108(b)(1) (it is unlawful for any person to alter "the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state" except in compliance with a permit).

²⁰ Tenn. Comp. R. & Regs. 0400-40-07-.01(3) ("State permits for these activities are Aquatic Resource Alteration Permits, which also serve as § 401 certifications where required.").

²¹ Tenn. Comp. R. & Regs. Chapter 0400-40-07.

²² Tenn. Comp. R. & Regs. Chapter 0400-40-03.

²³ Tenn. Comp. R. & Regs. 0400-40-03-.06.

DWR implements a robust program for the protection of state waters through its ARAP program. This state program is focused on minimizing impacts to streams²⁴ and wetlands²⁵ throughout Tennessee and ensuring mitigation of any unavoidable impacts. The ARAP program is similar to the Clean Water Act Section 404 program implemented by the U.S. Army Corps of Engineers (“Corps”). Applicants may secure ARAP coverage either through a general permit²⁶ (analogous to a Corps nationwide permit) or through an individual permit.²⁷

Applications for individual ARAPs require public notice and comment, including the opportunity for a public hearing.²⁸ Public notice must be provided to persons on DWR’s mailing list, posted on TDEC’s website,²⁹ published in a local newspaper of general circulation, posted on signs located within view of a public road, and sent to anyone who requests notice.³⁰ Public hearings must be provided if a written request is submitted during the comment period, there are water quality issues, and there is a significant public interest in having a hearing.³¹

Applicants for individual ARAPs must demonstrate a lack of practicable alternatives to the proposed aquatic impacts that would have less adverse impact on water resource values, and that do not have other significant adverse environmental consequences.³² Consistent with the Act’s prohibition on issuing a permit for an activity that would result in a condition of pollution by itself or in combination with others,³³ any impacts that would result in an appreciable permanent loss of water resource values must be offset by compensatory mitigation sufficient to result in no net loss.³⁴

In issuing an ARAP, DWR evaluates a broad range of water quality factors, including the direct loss of stream length, direct loss of in-stream or wetland habitat, diminishment in species composition, loss of stream canopy, etc.³⁵ These factors do not include demographics of the impact location.³⁶

ARAPs for new or expanded habitat alterations or water withdrawals must also comply with Tennessee’s Antidegradation Statement.³⁷ The Antidegradation Statement is a component of

²⁴ Tenn. Code Ann. § 69-3-103(41) (defining a “stream” as any surface water that is not a wet weather conveyance).

²⁵ Tenn. Comp. R. & Regs. 0400-40-07-.03(31) (defining a “wetland” as “an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetland generally include swamps, marshes, bogs, and similar areas.”).

²⁶ DWR’s General ARAPs may be found at <https://www.tn.gov/environment/permit-permits/water-permits1/aquatic-resource-alteration-permit-arap-/permit-water-aquatic-resource-alteration-list-of-general-permits.html>.

²⁷ DWR required Byhalia to obtain an individual ARAP, although the Corps granted coverage under a nationwide permit. As a result, in contrast to Tennessee’s process, the federal government issued a permit for the same water quality impacts without any opportunity for public engagement.

²⁸ Tenn. Comp. R. & Regs. 0400-40-07-.04(4).

²⁹ See <https://www.tn.gov/environment/ppo-public-participation/ppo-public-participation/ppo-water.html>.

³⁰ Tenn. Comp. R. & Regs. 0400-40-07-.04(4)(d) and (e).

³¹ Tenn. Comp. R. & Regs. 0400-40-07-.04(4)(f).

³² Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(b).

³³ Tenn. Code Ann. § 69-3-108(g).

³⁴ Tenn. Comp. R. & Regs. 0400-40-07-.04(6)(c) and (7)(a).

³⁵ Tenn. Comp. R. & Regs. 0400-40-07-.04(6).

³⁶ *Id.*

³⁷ Tenn. Comp. R. & Regs. 0400-40-03-.06.

Tennessee's Water Quality Criteria, which EPA has reviewed and approved on multiple occasions, including most recently in 2019.

Under the Antidegradation Statement, if the proposed impacts would result in more than *de minimis* degradation³⁸ of high-quality waters, the applicant must demonstrate that there are no practicable alternatives to the degradation and that the degradation is necessary for important social or economic development in the area of the degradation.³⁹ If the proposed impacts will result in no more than *de minimis* degradation, then the Antidegradation Statement does not require these demonstrations.⁴⁰

To demonstrate social or economic necessity for greater than *de minimis* degradation of water quality, the applicant must submit a justification that addresses issues such as job creation, tax revenue, the impact of the proposed degradation to future development potential in the area, and "additional information regarding economic or social necessity as directed by the Department."⁴¹ An analysis of social or economic necessity may include consideration of environmental justice factors where applicable.⁴²

Tennessee's water quality criteria include a definition of *de minimis* degradation. For discharges and water withdrawals, this definition is capped at five percent of available assimilative capacity or 7Q10 flow individually, and 10 percent cumulatively.⁴³ For habitat alterations, water quality degradation is *de minimis* if "the Division finds that the impacts, individually and cumulatively are offset by impact minimization and/or in-system mitigation."⁴⁴ In practice, this means that either the impacts are very small to begin with, or that compensatory mitigation is provided in the same watershed.⁴⁵ By promoting local mitigation for local impacts, this provision increases the likelihood that the same communities affected by authorized habitat alterations benefit from the compensatory mitigation.

ARAPs do not authorize activities that require a NPDES permit or an underground injection permit.⁴⁶ In particular, ARAPs do not authorize discharges to groundwater, such as leaks from an oil pipeline. Instead, ARAPs authorize only the specific aquatic impacts identified in the permit, not an overall project. For example, an ARAP for a stream crossing in a new residential subdivision authorizes only that stream crossing, not construction of the subdivision. The developer must still obtain all other local (*e.g.*, land use and building), state, and federal permits that may be required.

³⁸ Degradation is not the same thing as pollution. Degradation is the "alteration of the properties of waters by the addition of pollutants, withdrawal of water, or removal of habitat, except those alterations of a short duration." Tenn. Comp. R. & Regs. 0400-40-03-.04(3). By contrast, pollution is the alteration of the properties of waters that causes a violation of state water quality standards or similar harm. Tenn. Code Ann. § 69-3-103(28).

³⁹ Tenn. Comp. R. & Regs. 0400-40-03-.06(3)(b) and (c), (4)(c)2, and 3.

⁴⁰ However, the ARAP rules separately require a demonstration of a lack of practicable alternatives for all individual permits. Thus, *all* applicants for individual ARAPs must demonstrate a lack of practicable alternatives, while only applicants for impacts resulting in greater than *de minimis* degradation must demonstrate economic or social necessity.

⁴¹ Tenn. Comp. R. & Regs. 0400-40-03-.06(1)(b)4.

⁴² *Id.*

⁴³ Tenn. Comp. R. & Regs. 0400-40-03-.04(4)(a).

⁴⁴ Tenn. Comp. R. & Regs. 0400-40-03-.04(4)(b).

⁴⁵ Tenn. Comp. R. & Regs. 0400-40-03-.04(12) (defining in-system mitigation).

⁴⁶ Tenn. Comp. R. & Regs. 0400-40-07-.01(4).

Similarly, ARAPs for linear projects such as a road or a pipeline authorize *only* the aquatic impacts listed in the permit, and not the activities located in between those impacts. For example, it is common for DWR to issue ARAPs for aquatic impacts associated with state highways. These ARAPs do not authorize construction or operation of the highways. Instead, such ARAPs authorize only the specific impacts to surface waters associated with construction that are identified in the permit. The same is true for pipelines. If a linear project such as a highway or a pipeline could entirely avoid aquatic impacts, then no ARAP would be required.

Most ARAPs are concentrated in areas of rapid construction activity, where developers seek to alter streams and wetlands to enable new residential, commercial, and industrial development. In recent years, DWR's permits have been tracked through Waterlog, DWR's database for water records. DWR maintains a public, online dataviewer for its permits so the public can have full, transparent, and timely access to DWR records.⁴⁷ TDEC is submitting extracts from Waterlog for ARAPs from January 1, 2011, to June 30, 2021, including:

- All ARAPs (Dataset 1) (totaling 7,033 files);⁴⁸
- All individual ARAPs (Dataset 2);⁴⁹
- All coverages issued on ARAP general permits (Dataset 3);⁵⁰ and
- Individual ARAPs issued for aquatic alterations associated with oil and gas pipelines (Dataset 4).⁵¹

DWR's website includes interactive maps for permit locations and water quality data. To facilitate EPA's review, DWR has used these data to compile a statewide map of ARAPs with several ACS data layers, including for race and income, saved at:

<https://tdec.maps.arcgis.com/apps/webappviewer/index.html?id=c249dd8e462247a88f16deca80498251>.

II. The Pipeline and Permit⁵²

The Pipeline, as proposed, was to have been a 24-inch diameter, 49.63-mile, underground pipeline to transport crude oil.⁵³ The Pipeline would have originated at the Valero Refinery located along North Rivergate Road in Memphis, Shelby County, Tennessee (35.080599, -90.085003) and traveled south to the Corps' Memphis District boundary, approximately 0.75 miles northwest of

⁴⁷ This dataviewer can be accessed at https://dataviewers.tdec.tn.gov/pls/enf_reports/f?p=9034:34001. The top tab of this dataviewer provides links to additional DWR data.

⁴⁸ Ex. 3 - Dataset 1 (All ARAPs issued between 1.1.2011 and 6.30.2021).

⁴⁹ Ex. 4 - Dataset 2 (All IPs issued between 1.1.2011 and 6.30.2021).

⁵⁰ Ex. 5 - Dataset 3 (All GPs issued between 1.1.2011 and 6.30.2021).

⁵¹ Ex. 6 - Dataset 4 (Pipeline IPs). This list includes 17 such pipelines distributed across the state. Unfortunately, the geospatial data submitted with these applications is not in a form that is easily incorporated into GIS maps. These linear permits include multiple impact locations, not all of which are reflected in the latitudes/longitudes listed in this dataset. If EPA would like more in-depth information for each of these permits, those data are available through the permit database and may require manual entry of data into a GIS format for further analysis.

⁵² Records concerning the Permit are available at

https://dataviewers.tdec.tn.gov/pls/enf_reports/f?p=9034:34051:::34051:P34051_PERMIT_NUMBER:NRS20.089.

⁵³ Ex. 1 at 5.

Lynchburg, Mississippi (34.976713, -90.113004).⁵⁴ The proposed project alignment would re-enter the Corps' Memphis District in Marshall County, Mississippi approximately 2.7 miles west-northwest of Cayce, Mississippi (34.965895, -89.661525) and continue primarily north where it would terminate approximately 2.42 miles northwest of Cayce, Mississippi (34.979871, -89.645539).⁵⁵ The Pipeline would have connected two major existing crude oil pipeline systems: linking the Diamond Pipeline, originating in Cushing, Oklahoma, to the Capline System which extends from Central Illinois to the Gulf Coast.⁵⁶

On April 20, 2020, Byhalia submitted an ARAP and Section 401 Water Quality Certification application to DWR, seeking authorization for seven stream crossings and six wetland crossings associated with the Pipeline.⁵⁷ The ARAP and Section 401 Water Quality Certification application dealt only with the 7.16-mile portion of the project occurring within Shelby County, Tennessee.⁵⁸ The balance of the pipeline route was outside of DWR's jurisdiction.

On April 24, 2020, DWR responded with a letter identifying several deficiencies in the application, including:

5. Detailed information is required under Section 10. Detailed Alternative Analysis, especially in regards to any other sites that were evaluated, avoidance and minimization. The social and economic justification should include information on jobs created, revenue generated, and taxes collected.⁵⁹

On May 19, 2020, Byhalia submitted a partial response regarding alternative Pipeline routing.⁶⁰ On June 19, 2020, Byhalia submitted the following analyses to DWR:

No Action Alternative

Under this alternative, Byhalia would not construct or operate the proposed pipeline. This alternative would not provide an interconnection to the two existing major crude oil pipeline systems, connecting major terminals in Cushing, Oklahoma with the Capline Pipeline running between Central Illinois and the Gulf Coast. The no action alternative does not meet the project's overall purpose of providing a connection between these two pipelines and was not further considered.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 265.

⁵⁷ *Id.* at 1-249.

⁵⁸ *Id.* at 5.

⁵⁹ *Id.* at 250-51.

⁶⁰ *Id.* at 252-64.

Alternative 1 – East Route (Red)⁶¹

Byhalia considered an approximately 33-mile route east from the Valero Refinery and through the City of Memphis. However, this route has significant environmental impacts associated with multiple crossings of the Noncannah River and its associated wetland and floodplains. This route would closely parallel the Noncannah River for approximately 6 miles with four river crossings. Furthermore, this route is adjacent to the Noncannah Levee System (Civil Works Project) for approximately 1 mile with open cuts and drills near the levee which could affect the structural integrity of the flood control structure. Additionally, along the portion of the route paralleling the levee, the presence of existing utilities and other infrastructure, would greatly constrain the space necessary to safely construct the project. This route would also cross through Memphis International Airport property, industrial areas, and residential areas raising safety and constructability concerns. This alternative is impracticable based on environmental, safety, and constructability concerns.

Alternative 2 – Corridor Route (Blue)

Byhalia considered an approximately 35-mile route travelling south from of the Valero Refinery that would travel through the city of Memphis before meeting up with the Alternative 1 – East Route. However, safely constructing the pipeline in this route may not be possible due to limited space along railroad and overhead transmission line corridors. This route would cross the Memphis Harbor (McKellar Lake) and would encroach on T.O. Fuller State Park and cross under a significant aquatic resource in Robco Lake. Additionally, acquiring the right-of-way for portions of this route crossing Tennessee Valley Authority (TVA) lands may be difficult. The Alternative 2 corridor route would cross through fewer industrial areas than Alternative 1, but still pass through several residential neighborhoods raising safety and constructability concerns. Alternative 2 is impracticable due to constructability concerns and its routing through a state park and residential neighborhoods.

Alternative 3 – Western Route (Yellow)

Byhalia considered an approximately 50-mile route travelling west from of the Valero Refinery that would largely avoid City of Memphis residential areas before meeting up with Alternative 5 – Proposed/Preferred Route. This route would cross the Ensley Levee System (Civil Works Project) twice, which raises concerns over the structural integrity of the flood control structures. This route also crosses North Horn Lake and its associated wetlands. Additionally, this route would cross adjacent to the TVA coal ash remediation site[.] Trenching and drilling associated with construction of the Project could potentially exacerbate pre-existing groundwater contamination associated with this site and result in contaminant

⁶¹ SELC identified this alternative route as a practicable alternative in its request for DWR to rescind the Permit. This route would also have impacted communities of color protected by Title VI. Byhalia did not disclose to DWR that an affiliated company operates a pipeline on this route.

migration. This route would cross T.O. Fuller State Park and is near the Chucalissa Archaeological Park, which may impact cultural resources. This alternative is impracticable due to these combined factors.

Alternative 4 – South Route (Purple)

Under alternative 4, Byhalia considered an approximately 43-mile route travelling south from the Valero Refinery to Horn Lake, Mississippi before turning east. This route would cross the Memphis Harbor (McKellar Lake), T.O. Fuller State Park and a Desoto County, Mississippi property containing a public softball field. Additionally, this route would cross a previously recorded cemetery. Although the cemetery has likely been moved due to previous construction and development activities, significant cultural resource impacts could occur if unmoved or unmarked graves were encountered during construction. This route also crosses several properties where right-of-way access is a concern. This alternative is impracticable primarily due to landowner access and cultural resource concerns.

Alternative 5 – Preferred Alternative (Green)

The proposed route selected as the preferred alternative by Byhalia is an approximately 49-mile route that travels south from of the Valero Refinery to Horn Lake, Mississippi before turning east. This route avoids more densely populated residential neighborhoods by primarily travelling through undeveloped rural areas. This route avoids the private parcels with landowner access issues discussed in Alternative 4 and also avoids T.O. Fuller State Park, federal properties, Robco Lake, levee systems and previously recorded cemeteries. This route crosses wetlands associated with the Coldwater River and Clearwater Creek but avoids crossing the Coldwater River. Impacts to waters are temporary during construction and the avoidance and minimization measures, as described below, will be incorporated to reduce the temporary impacts. Further, due to the linear nature of the Project, there is no alternative route that can avoid impacts to the aquatic ecosystem. Alternative routes will have new and significant adverse consequences (e.g., cultural, hydrological, environmental).

Social and Economic Justification (Environmental Justice)

The project would have significant economic benefits to the local economies. An Economic Impact Study performed by the University of Mississippi estimated pipeline construction would result in \$14 million of direct economic benefits and generate tens of millions in indirect benefits and property tax revenue in DeSoto, Marshall and Shelby counties. Construction of the project will have a positive ripple effect specific to the regional economy in Tennessee, generating \$2.4 million of economic impact in Shelby County alone. Likewise, property taxes generated by operation of the Byhalia Connection Pipeline will strengthen the local tax base each year, generating approximately \$500 thousand each year.⁶²

⁶² *Id.* at 265-69.

On July 14, 2020, DWR gave a notice of public hearing on the draft permit and rationale.⁶³ The rationale stated, “In accordance with the Tennessee Antidegradation Statement (Rule 0400-40-03-.06), the Division has made a preliminary determination that the proposed activities will result in *de minimis* degradation because the applicant proposes to provide in-system mitigation to offset any appreciable permanent loss of resource values.”⁶⁴ The hearing was set for August 27, 2020.⁶⁵ Notice was given via DWR’s email list, posting on TDEC website, publication in a newspaper of general circulation (*Commercial Appeal*, July 21, 2020), and signs located at permitting impacts visible from public roads. The public notice stated:

Individuals with disabilities who wish to participate in these proceedings or review the file record should contact TDEC to discuss any auxiliary aids or services needed to facilitate such participation. Contact may be by writing, telephone, or other means, and should be made no less than ten working days prior to the hearing to allow time to provide such aid or services. Contact the ADA Coordinator (615-532-0207) for further information. If it is hard for you to read, speak, or understand English, TDEC may be able to provide translation or interpretation services free of charge by contacting Saul Castillo at 615-532-0462 or saul.castillo@tn.gov.⁶⁶

On August 27, 2020, because of the declared COVID-19 emergency, DWR conducted a public hearing on the draft permit virtually via WebEx and by telephone.⁶⁷ DWR received comments from the public through September 11, 2020. Comments centered on concerns about contaminating groundwater, impacts to the Memphis Sands aquifer, the public hearing process and procedure, alternatives analysis, environmental justice, Byhalia’s compliance record in other states, use of coffer dams, the Pipeline’s effect on home values, economic benefits, and energy dependency.⁶⁸

DWR issued a Notice of Determination on November 9, 2020, containing its determination that Byhalia’s preferred Pipeline route, with conditions, represented the practicable alternative that would achieve the project objective and have the least adverse impact on water resource values.⁶⁹ Consistent with the original rationale, the Notice stated that, in accordance with the Tennessee Antidegradation Statement (Tenn. Comp. R. & Reg. 0400-40-03-.06), DWR had determined that the proposed activities would result in *de minimis* degradation to Tennessee waters because Byhalia proposed to provide in-system mitigation to offset any appreciable permanent loss of resource values.⁷⁰

The Notice of Determination included responses to citizen comments.⁷¹ DWR responded that, among other things (paraphrased in part):

⁶³ *Id.* at 301-05.

⁶⁴ *Id.* at 292.

⁶⁵ *Id.* at 301.

⁶⁶ *Id.* at 302.

⁶⁷ *Id.* at 301.

⁶⁸ *Id.* at 309-15.

⁶⁹ *Id.* at 306-15.

⁷⁰ *Id.* at 309.

⁷¹ *Id.* at 310-15.

- The Permit application is for the stream crossings and the wetland impacts associated with construction of the pipeline, not the operation of the pipeline. The operation of the pipeline is under the Pipeline and Hazardous Materials Safety Administration (PHMSA's) jurisdiction;
- ARAPs do not regulate discharges to groundwater or the operation of the Pipeline;
- All of TDEC's public notice rules were followed in this case and that the virtual hearing format, which included a call-in number for those without internet, actually allowed for increased participation;
- DWR used the following criteria to evaluate the alternative routes for the Pipeline:
 - Residential neighborhoods
 - Protected species and habitat
 - Wetlands and waterways
 - Historic sites and cultural resources
 - Federal, state, and local government facilities, structures, or lands
 - Private property access
 - Pipeline constructability
 - The preferred project route was chosen not only to minimize impacts to the environment, but also to cultural sites, public lands, levees, landowners, and communities during construction and once the Pipeline is in service. The proposed route parallels existing pipeline and utility corridors where practical to reduce its overall footprint, with additional avoidance and minimization measures employed to reduce impacts to natural resources where possible. This route avoids more densely populated residential neighborhoods by primarily travelling through undeveloped rural areas. This route avoids private parcels with landowner access issues and also avoids T.O. Fuller State Park, federal properties, Robco Lake, levee systems, and previously recorded cemeteries. This route crosses wetlands associated with the Coldwater River and Clearwater Creek, but avoids crossing the Coldwater River. Impacts to waters are temporary during construction and the avoidance and minimization measures, as described below, will be incorporated to reduce the temporary impacts. Further, due to the linear nature of the Pipeline, there is no alternative route that can avoid impacts to the aquatic ecosystem. Alternative routes will have new and significant adverse consequences (e.g., cultural, hydrological, environmental).
 - Based on the available information DWR made a determination that Byhalia had demonstrated that the preferred route represented the least impactful practicable alternative.
 - Because the proposed aquatic impacts were fully mitigated in-system, the activities authorized by the Permit would result in no more than *de minimis* degradation to waters. Accordingly, there was no requirement for Byhalia to demonstrate social or economic necessity of its proposed degradation of water quality.
- Tennessee does not currently have an executive order or specific language within rule or statute that requires and/or provides TDEC the explicit authority to consider environmental justice within its environmental regulatory program actions. However,

striving for the equal treatment of all communities in administering environmental, natural resource, parks, and conservation programs is a department priority. TDEC takes a collaborative approach to environmental justice by working with communities to ensure that historically underserved low-income and minority communities are afforded equal access to its programs and services and provided adequate opportunities for meaningful involvement of all people with respect to the development, implementation and enforcement of laws, regulations and policies related to the application.

- There is no legal basis to deny a permit based on alleged violations by another company in another state.
- DWR's authority is limited to matters affecting water quality and within the authority of the Tennessee Water Quality Control Act of 1977. Those matters not within DWR's authority cannot be addressed by DWR in the permitting of the Pipeline.⁷²

On November 17, 2020, DWR issued the Permit (§ 401 Water Quality Certification, State of Tennessee ARAP NRS No. 20.089), authorizing temporary impacts to 2.294 acres within six wetlands, permanent conversion of 0.87 wetlands, and seven stream crossings associated with the Pipeline construction.⁷³ The authorized impacts were identified with specificity, including latitude/longitudes for each impact point.⁷⁴ The Permit was issued for a five-year term.⁷⁵ The Permit required that impacts to perennial streams be minimized through the use of HDD construction methods, among other conditions to protect water quality.⁷⁶ The Permit required the purchase of 1.74 wetland credits from the Tennessee Mitigation Fund, Southwest TN Service Area prior to impacts to wetlands.⁷⁷ The Permit required monitoring and reporting.⁷⁸ The Permit expressly stated that the “issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State, or local laws or regulations.”⁷⁹ Finally, the Permit stated “it shall be the responsibility of the permittee to conduct its discharge activities in a manner such that public or private nuisances or health hazards will not be created” and “This permit does not preclude requirements of other federal, state or local laws.”⁸⁰

Several parties appealed the Permit.⁸¹ While these appeals were pending, on July 2, 2021, Byhalia announced discontinuance of plans for the Pipeline, citing “lower [U.S.] oil production resulting from the COVID-19 pandemic.”⁸² The appealing parties have represented to TDEC that

⁷² *Id.*

⁷³ *Id.* at 316-36.

⁷⁴ *Id.* at 319-20, 322.

⁷⁵ *Id.* at 320.

⁷⁶ *Id.* at 322-24.

⁷⁷ *Id.* at 325.

⁷⁸ *Id.*

⁷⁹ *Id.* at 326.

⁸⁰ *Id.* at 328.

⁸¹ *Id.* at 337-44.

⁸² Daniel Connolly, Lucas Finton, & Micaela A. Watts, *Company drops plans for Byhalia pipeline; Activists rejoice: ‘Sometimes the good guys win’*, Commercial Appeal, July 2, 2021, available at <https://www.commercialappeal.com/story/news/2021/07/02/plains-all-american-abandons-plan-byhalia-connection-oil-pipeline-memphis/7848508002/> (last visited Aug. 3, 2021).

once they are provided with an agreement/order surrendering the Permit and signed by Byhalia's counsel, they will dismiss their appeals.

ARGUMENT

I. TDEC did not discriminate on the basis of race in violation of Title VI and EPA's nondiscrimination regulation at 40 C.F.R. Part 7, when TDEC issued Aquatic Resource Alteration Permit and Section 401 Certification NRS20.089 for the Byhalia Connection Pipeline on November 17, 2020.

a. TDEC complied with its statutory and regulatory obligations in issuing the Permit.

TDEC strictly complied with its statutory and regulatory obligations when it issued the Permit. These statutory obligations were to ensure that the aquatic impacts that the Permit authorized would not result in pollution of waters of the state, included appropriate monitoring requirements, and was for no more than a five-year term.⁸³ The Permit's mitigation requirement fully offset the proposed degradation.⁸⁴

TDEC complied with the ARAP rules. It solicited a complete application from Byhalia, including a supplement to its original application.⁸⁵ TDEC required Byhalia to demonstrate that there was not a practicable alternative to the proposed impacts that would have lesser water quality impacts.⁸⁶ TDEC required Byhalia to provide compensatory mitigation sufficient to result in no net loss of water resources.⁸⁷ TDEC imposed a comprehensive list of conditions to minimize impacts to water quality.⁸⁸ These conditions are comparable to permit conditions in other ARAPs, including other ARAPs associated with pipelines.

TDEC went beyond the requirements of the ARAP program and the Antidegradation Statement by evaluating public comments concerning potential contamination of the Memphis Sands Aquifer from *operation* of the pipeline, which the ARAP neither authorizes nor regulates.⁸⁹ TDEC assigned the supervisor of its underground injection control program, a highly qualified professional geologist familiar with this aquifer, to this review. His conclusion was that these claims lacked scientific support.

⁸³ Tenn. Code Ann. § 69-3-108(g).

⁸⁴ Ex. 1 at 325.

⁸⁵ *Id.* at 1-264.

⁸⁶ Tenn. Comp. R. & Regs. 0400-40-07-.04(5)(b). It is possible that Byhalia withheld information from TDEC needed to correctly make this determination by failing to disclose the existing pipeline associated with Alternative 1, though this is speculative. However, the Permit specifically addressed that situation by stating, "If the permittee becomes aware that he/she failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Director, then he/she shall promptly submit such facts or information." Ex. 1, at 326. TDEC made its permit decision based on the information available to it at the time. Alternative 1 would have impacts to both the Nonconnah River and to communities protected by Title VI.

⁸⁷ Tenn. Comp. R. & Regs. 0400-40-07-.04(6)(c) and (7).

⁸⁸ Ex. 1 at 322-24.

⁸⁹ Ex. 1 at 311.

TDEC complied with public notice requirements of both the ARAP rules and the Antidegradation Statement. TDEC prepared a draft permit and a detailed rationale, and then provided public notice as required by the ARAP rules (website posting, emails, signs, and newspaper notification). The rationale with the public notice included a statement of TDEC's preliminary determination regarding the level of degradation.⁹⁰

Anticipating significant local interest, TDEC proactively scheduled a public hearing without having received a request from the public. Although some commenters complained that the public hearing was conducted via videoconference with a telephone option, there was no safe way to conduct an in-person public hearing in the middle of the COVID-19 crisis. A crowded, lively, in-person hearing in August 2020 would have had a high potential of being a super-spreader event. Moreover, there is no legal requirement for a public hearing to be conducted in-person, and *all* TDEC public hearings at the time were being conducted in the same manner.⁹¹

TDEC complied with the Antidegradation Statement. Because the impacts authorized by the Permit were required to be fully offset by in-system mitigation, DWR determined that the impacts would result in only *de minimis* degradation. Accordingly, Byhalia had no legal obligation to demonstrate that the proposed degradation was necessary for important social or economic development in the area because all such degradation would be fully offset in the same area.⁹²

b. TDEC complied with Title VI in issuing the Permit.

TDEC engaged in neither disparate treatment nor disparate impact discrimination in issuing the Permit.

Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁹³ Congress enacted Title VI "to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution."⁹⁴ But the Supreme Court has held that Title VI "prohibits only intentional discrimination."⁹⁵

⁹⁰ Tenn. Comp. R. & Regs. 0400-40-03-.06(1)(c).

⁹¹ See Tenn. Comp. R. & Regs. 0400-40-07-.04(f) (requiring only that a hearing be conducted in the geographical area of the proposed impact, a condition that is satisfied by allowing local residents to participate in the hearing from their homes). TDEC conferred with EPA Region 4 in the spring of 2020 concerning EPA's interpretation of the public hearing requirement for NPDES permits and other delegated permits. TDEC incorporated recommendations from EPA—including to provide a telephone option for people who lack internet access—in its public hearing process during the pandemic. TDEC has just recently begun conducting in-person public hearings again, although it is aware of a breakthrough COVID-19 infection in vaccinated staff associated with these events.

⁹² Tenn. Comp. R. & Regs. 0400-40-03-.04 (defining *de minimis* degradation) and -.06(1)(b)4, (3)(c), and (4)(c)3 (requiring a demonstration of economic or social necessity only for habitat alterations result in more than *de minimis* degradation).

⁹³ 42 U.S.C. § 2000d.

⁹⁴ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 284 (1978).

⁹⁵ *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Disparate Treatment⁹⁶

Federal civil rights laws and EPA's implementing regulation prohibit recipients of federal funding such as TDEC from intentionally discriminating in their programs and activities based on race, color, or national origin, disability, sex, or age.⁹⁷ This is referred to as "disparate treatment."⁹⁸ The regulation at 40 C.F.R. § 7.35(a), states that "a recipient shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity."

Intentional discrimination requires a showing that a "challenged action was motivated by an intent to discriminate."⁹⁹ Evidence of "bad faith, ill will or any evil motive on the part of the [recipient]" is not necessary.¹⁰⁰ Evidence in a disparate treatment case must generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.¹⁰¹ The "totality of the relevant facts" determine whether intentional discrimination has occurred.¹⁰² Intentional discrimination under Title VI may be proven by either direct or indirect evidence.¹⁰³

Disparate Impact

While Title VI itself only bars intentional discrimination, EPA's regulation also prohibits disparate impact discrimination.¹⁰⁴ The regulation, at 40 C.F.R. § 7.35(6), states in relevant part, that "[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

⁹⁶ SELC does not allege disparate treatment in the Complaint—only disparate impact. However, in the interest of completeness, and with the understanding that ECRCO is not bound to the allegations of the Complaint, TDEC sets forth the legal standards applicable to a disparate treatment claim here. TDEC did not intentionally discriminate against residents of the Boxtown neighborhood.

⁹⁷ 40 C.F.R. § 7.30 et seq.; 42 U.S.C. §§ 2000d to 2000d-7.

⁹⁸ See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("Title VII prohibits [] intentional discrimination (known as 'disparate treatment')"). Title VII standards are instructive in Title VI cases. See *NAACP v. Medical Center, Inc.*, 657 F.2d 1322, 1331 (3d Cir. 1981) (en banc); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (courts in Title VI disparate impact cases look to Title VII cases for guidance).

⁹⁹ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

¹⁰⁰ *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

¹⁰¹ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

¹⁰² See *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.").

¹⁰³ *Sagr v. Univ. of Cincinnati*, No. 1:18-cv-542, 2019 U.S. Dist. LEXIS 26467, at *39 (S.D. Ohio Feb. 20, 2019).

¹⁰⁴ See *Sandoval*, 532 U.S. at 281-82 ("we must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."); see also *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d at 1036 ("In *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 77 L. Ed. 2d 866, 103 S. Ct. 3221 (1983), the Supreme Court held that [Title VI] only prohibits intentional discrimination, not actions that have a disparate impact upon minorities. Nonetheless, the Court concluded that Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact standard." (citations omitted)).

Unlike a disparate treatment claim, a disparate impact claim requires no showing of intent to discriminate.¹⁰⁵ Rather, a complainant must allege that a specific, facially neutral practice had an adverse effect on a certain group because of their race, color, or national origin.¹⁰⁶ This is referred to as the prima facie case.¹⁰⁷ To establish an adverse disparate impact in a case such as this, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;
- (3) establish disparity; and
- (4) establish causation.¹⁰⁸

A neutral policy or decision at issue need not be limited to one formalized in writing.¹⁰⁹ Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to act or to adopt an important policy.¹¹⁰

If the evidence establishes a prima facie case of adverse disparate impact, it must then be determined whether the recipient has articulated a “substantial legitimate justification” for the challenged policy or practice.¹¹¹ The concept of “substantial legitimate justification” in the Title VI context is similar to the concept of “business necessity” in the Title VII context.¹¹² This analysis requires balancing the recipient’s interests in implementing the recipient’s policies with the substantial public interest in preventing discrimination.¹¹³ “Business necessity” does not mean that the practice must be essential to the recipient’s business, but only related to the recipient’s business.¹¹⁴

¹⁰⁵ *Johnson v. Metro. Gov’t*, No. 3:07-0979, 2008 U.S. Dist. LEXIS 59663, at *7-8 (M.D. Tenn. Aug. 4, 2008); *Lau v. Nichols*, 414 U.S. 563, 568 (1974); *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 575 (2d Cir. 2003).

¹⁰⁶ *Johnson*, 2008 U.S. Dist. LEXIS 59663, at *7-8.

¹⁰⁷ U.S. EPA’s External Civil Rights Compliance Office Toolkit, p. 8 (Jan. 18, 2017), https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-fags.pdf

¹⁰⁸ *Id.*

¹⁰⁹ See *Gainerv. United Auto. Aero. Agric. Implement Workers (UAW) Region 9*, No. 08-CV-0501-WMS-MJR, 2017 U.S. Dist. LEXIS 87725, at *42 (W.D.N.Y. June 6, 2017) (“defendants’ unwritten policy that IR candidates must have bargaining experience disproportionately affects African Americans and women, because those groups are less likely to be elected to leadership positions in their local unions. Plaintiff has arguably identified a neutral employment policy.”).

¹¹⁰ See, e.g., *United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient “failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services” and discriminatory conduct of detention officers was facilitated by “broad, unfettered discretion and lack of training and oversight” resulting in denial of access to important services).

¹¹¹ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

¹¹² *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417-18 (11th Cir. 1985) (analogizing “legitimate justification” of “educational necessity” with Title VI’s “business necessity”).

¹¹³ Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination - Disparate Impact, § C2, <https://www.justice.gov/crt/fcs/T6Manual7#U>

¹¹⁴ Mattheisen, Michael D., *Applying the Disparate Impact Rule of Law to Environmental Permitting under Title VI of the Civil Rights Act of 1964*, 24 Wm. & Mary Envtl. L. & Pol’y Rev. 1, 23 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

Recipients are not per se prohibited from taking actions that will have differential impacts on protected groups.¹¹⁵ “Rather, Title VI prohibits taking actions with differential impacts without adequate justification.”¹¹⁶

If the recipient carries this rebuttal burden, the complainant will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the recipient’s proffered justification is a pretext for discrimination.¹¹⁷

A complainant has a duty to demonstrate a causal link between the recipient’s challenged practice and the disparate impact identified.¹¹⁸ As one commentator notes, “[u]nder the disparate impact rule, causation must be identified with some particularity; generalized allegations of causation will not support a disparate impact claim.”¹¹⁹ A complainant must point to a specific practice that allegedly caused a discriminatory impact to a protected group.¹²⁰ Without such specificity, it is impossible for a complainant to show that the practice leading to a disparate impact was justified by business necessity.¹²¹

A statistical racial demographic imbalance in and of itself does not violate the disparate impact rule, or mean that a Title VI violation has necessarily occurred.¹²² “[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”¹²³ This protects a recipient from being held liable for racial disparities the recipient did not create.¹²⁴ “As the disparate impact rule only prohibits *causing* disparate impacts, not the mere existence of disparate impacts or conditions, neither Title VI nor the disparate impact rule necessarily requires a racially balanced result or condition.”¹²⁵ Courts decline to find disparate impact discrimination where any policy or action taken with respect to a certain group will necessarily affect more protected individuals than non-protected, but allegations of discrimination involve nothing more than statistical disparity.¹²⁶ Proving disparate impact under Title VI requires “a reliable indicator of disparate impact” and “an appropriate statistical measure” that takes into account all relevant bases of comparison.¹²⁷

Argument

The Complaint does not allege disparate treatment. Rather, the Complaint alleges that TDEC’s issuance of the Permit resulted in a disparate impact to persons protected by Title VI.

¹¹⁵ *Coalition of Concerned Citizens against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Elston*, 997 F.2d 1394 at 1407.

¹¹⁹ *Mattheisen*, *supra* note 114, at 17.

¹²⁰ *Latinos Unidos de Chelsea En Accion (LUCHA) v. Sec’y of Hous. & Urban Dev.*, 799 F.2d 774, 786 (1st Cir. 1986).

¹²¹ *Id.* at 787.

¹²² *Mattheisen*, *supra* note 114, at 20.

¹²³ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542 (2015).

¹²⁴ *Id.*

¹²⁵ *Id.* (citing *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1305 (11th Cir. 1989)).

¹²⁶ *See, e.g., Edwards v. Johnston Cty. Health Dep’t*, 885 F.2d 1215, 1223-24 (4th Cir. 1989).

¹²⁷ *S. Bronx Coal. for Clean Air v. Conroy*, 20 F. Supp. 2d 565, 573 (S.D.N.Y. 1998) (citing *New York Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1038 (2d Cir. 1995)).

TDEC did not engage in disparate impact discrimination in issuing this or any other ARAP, and SELC offered *no* evidence of disparate impact.

a. SELC fails to show a disparate impact because the Complaint takes too narrow a view of the policy at issue and of the affected population.

SELC's allegations fail on the most fundamental level of a disparate impact analysis: showing a disparate impact. According to ECRCO's compliance toolkit, this means that there is insufficient evidence to show that TDEC engaged in discrimination.¹²⁸

"[T]he starting point" for a determination of statistical disproportionate impact is "the subset of the population that is affected by the disputed decision."¹²⁹ As the United States Department of Justice (DOJ) has said, in its Title VI disparate impact guidance, "the legally relevant 'population base' for a statistical measure of adverse disparate impact is *all persons* the policy or practice affects or who could possibly be affected by some change in (or the elimination of) the policy or practice."¹³⁰ Put another way: "The correct inquiry is whether the policy in question had a disproportionate impact on the minorities *in the total group* to which the policy was applied."¹³¹

TDEC is a statewide regulatory agency and issues ARAPs in every reach of the state of Tennessee. The total group at issue here is not the residents of Boxtown, but the population of the state of Tennessee. All Tennesseans are affected by TDEC's policy and practice in issuing ARAPs—whether they reside in predominantly Black areas of Memphis or predominantly White areas of East Tennessee. The Complaint fails to even allege that, when considering *everyone* affected by TDEC's permitting policy, there is any racial disparity.

There are cases that present useful analogues to this situation by standing for the proposition that an appropriate measure of disparity must be employed. In *New York City Environmental Justice Alliance*, the Second Circuit noted that a plaintiff in a disparate impact case must show "a significantly discriminatory impact," which requires employment of an "appropriate measure" for assessing disparate impact.¹³² In that case, the plaintiffs challenged New York City's elimination of some 600 community gardens in minority neighborhoods, arguing that this

¹²⁸ U.S. EPA's External Civil Rights Compliance Office Toolkit, at p. 11 (Jan. 18, 2017), https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

¹²⁹ *Hous. Inv'rs, Inc. v. City of Clanton*, 68 F. Supp. 2d 1287, 1299 (M.D. Ala. 1999) ("Whether the measure of disparate impact used is disproportional representation, in which the percentage of minority representation in the affected group is compared against that minority's representation in the general population, or disproportionate adverse impact, in which the minority group's percentage representation in the affected group is compared against the majority group's representation in the affected group, the starting point is always the subset of the population that is affected by the disputed decision.").

¹³⁰ DOJ, *supra* note 113, at §C(1)(c)(iii) (emphasis added).

¹³¹ *Betsey v Turtle Creek Associates*, 736 F.2d 983, 987 (4th Cir. 1984) (emphasis added).

¹³² *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000) (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1982)).

produced a disparate impact on protected communities.¹³³ The plaintiffs cited the city's elimination of open space/green space in minority communities as the adverse impact of the city's action.¹³⁴

The Second Circuit found this focus to be unacceptably narrow because the plaintiffs' statistics only compared available space from community gardens, parks, and playgrounds, and excluded space from regional parks available to minority communities.¹³⁵ It was possible that adding in space from regional parks would eliminate any disparity.¹³⁶ The court held that in using "open space" as a measure, the plaintiffs needed to establish that its reduction in minority communities "determines the impact of the City's actions on those communities *compared with the impact of those actions on non-minority communities*."¹³⁷

In *Greater New Orleans Fair Housing Action Center v. HUD*, the D.C. Circuit rejected a challenge to one part of HUD's formula for awarding hurricane relief grants.¹³⁸ The plaintiffs argued that HUD's formula produced a disparate impact on African Americans by offering them less access to rebuilding programs after Hurricane Katrina and Hurricane Rita.¹³⁹ The D.C. Circuit found the plaintiffs' claims to be unduly circumscribed, focusing on one part of the formula that may have adversely impacted African Americans while leaving out parts of the formula that may have produced disparate benefits.¹⁴⁰ The court reframed the question thusly: "whether the formula *as a whole* had a disparate impact on African American grant applicants."¹⁴¹ The plaintiffs' claim also suffered from an over-narrow geographical scope—the court rejected the plaintiffs' evidence that was limited to a single parish because HUD applied the formula in a much broader geographic area.¹⁴²

DOJ guidance advises that agencies investigating disparate impact claims "should identify the area where the negative effects occur *even if that area is larger than the area that is the focus of the complainant's allegation*."¹⁴³ This guidance cites *Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, in which the plaintiffs argued that New York City had located shelters for the unhoused in Brooklyn's minority communities, producing disparate impact.¹⁴⁴ But instead of limiting its inquiry to the plaintiffs' scope, the court noted that, "we find that to determine ethnic discrimination in the placing of shelters, the universe or pertinent area must be the City as a whole, which is the extent of the City's jurisdiction, and it is not limited to the geographical region of Brooklyn."¹⁴⁵

TDEC's policy and practice regarding issuance of ARAPs is the same throughout the state and the Complaint does not allege otherwise. TDEC employed no special policy nor made any

¹³³ *Id.* at 67.

¹³⁴ *Id.* at 71.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (emphasis added).

¹³⁸ 639 F.3d 1078, 1079 (D.C. Cir. 2011).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1086.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ DOJ, *supra* note 113, at §C(1)(a) (emphasis added).

¹⁴⁴ 651 F. Supp. 1202, 1206 (E.D.N.Y. 1987).

¹⁴⁵ *Id.* at 1209.

special dispensation in the issuance of the Permit. So, to the extent that the Complaint focuses only on the demographics of the Boxtown neighborhood in Memphis, as opposed to the demographics of the state of Tennessee, which is TDEC's jurisdiction, the Complaint's claims are underinclusive.

The Complaint shows that there is *an* impact from the Pipeline to a predominantly Black neighborhood, but not that this impact is greater than that borne by non-minority communities across Tennessee resulting from TDEC's ARAP issuance practice. A disparate impact claim must show precisely that—an impact that is *disparate*.

In this case, the impact of the aquatic alterations associated with the Pipeline¹⁴⁶ falls on predominantly Black residents of Memphis's Boxtown neighborhood. However, SELC does not and cannot allege that TDEC's rules, policies, and practices result in TDEC only granting ARAPs for aquatic alterations associated with pipelines in predominantly Black neighborhoods.¹⁴⁷

TDEC has issued individual ARAPs for aquatic alterations associated with at least 17 oil and gas pipelines in the last 10 years.¹⁴⁸ These permits are listed in Ex. 6,¹⁴⁹ and detailed information about each permit is available by entering the permit number in the search box of DWR's Permit Database.¹⁵⁰ These permits are associated with oil and gas pipelines in Bradley County, Davidson County,¹⁵¹ Cumberland County, Knox County, Cheatham County, Loudon County, McMinn County, Shelby County, and elsewhere. For example, in 2015, DWR issued an ARAP for impacts associated with the Athens Utility Board's 23.25-mile natural gas pipeline in McMinn County (92.5 percent White, 3.9 percent Black).¹⁵² By comparison, the population of Tennessee as a whole is 78.4 percent White and 17.1 percent Black.

Further undermining SELC's bald assertion of disparate impact is the fact that since issuing the Permit, TDEC has issued two individual ARAPs associated with oil and gas pipelines, both of which are in communities that are disproportionately White:

- Middle Tennessee Natural Gas Pipeline (NRS20.225). This permit involves an 18.7-mile natural gas pipeline extension. The permit authorizes a total of 25 stream and wetland crossings in the Caney Fork River Watershed in Cumberland County (96.9 percent White, 0.7 percent Black) and Bledsoe County (89.9 percent White, 7.7 percent Black).

¹⁴⁶ SELC's Complaint assigns blame to TDEC for numerous impacts the Permit did not authorize. Again, the *only* activities authorized by the Permit were the specified aquatic alterations listed in writing in the Permit. TDEC did not authorize construction or operation of the Pipeline. It certainly did not authorize condemnation, leaks to groundwater, or changes in property values. Many of the concerns raised by SELC are land use matters subject to local government regulation.

¹⁴⁷ See *Edwards v. Johnston Cty. Health Dep't*, 885 F.2d 1215, 1224 (4th Cir. 1989) (noting that "[plaintiffs] do not, for example, claim that appellees have somehow approved substandard housing only for minority migrant workers while rejecting substandard housing for white migrant workers or other white citizens.").

¹⁴⁸ It is possible there are additional pipeline impacts authorized through general permits, or that are not identified as pipelines in the searchable data in Waterlog. DWR does not include a data field for project type because the permits do not authorize the projects but instead the aquatic impacts.

¹⁴⁹ Although each of these entries includes a latitude/longitude and a county, these linear projects may have multiple impact points and affect multiple counties.

¹⁵⁰ https://dataviewers.tdec.tn.gov/pls/enf_reports/f?p=9034:34001.

¹⁵¹ This was in the Radnor Lake area of Davidson County, which is predominantly White.

¹⁵² All demographic data cited herein are from the U.S. Census Bureau, www.census.gov/quickfacts

- Beech Plaza Circle Gas Main (NRS21.019). This permit involves 1,125 feet of gas line, 1,865 feet of return sludge line, and 600 feet of water line in Henderson County (89.5 percent White, 7.8 percent Black).

The ARAPs associated with these pipelines are very similar to the now-rescinded Permit: they follow the same rules and result in the same level of protection related to authorized aquatic impacts.

TDEC has reviewed 7,033 ARAPs across Tennessee from January 1, 2011, to June 30, 2021.¹⁵³ TDEC has prepared an interactive map of ARAPs that includes demographic layers, including for race, which is available at:

<https://tdec.maps.arcgis.com/apps/webappviewer/index.html?id=c249dd8e462247a88f16deca80498251>.

It is difficult to summarize the extensive data provided in this map. However, even a cursory review amply demonstrates that DWR issues ARAPs throughout Tennessee, not just in low-income Black communities. Rather, DWR issues permits based on the applications it receives. The locations of these applications are driven by free-market development forces, not TDEC policy.

There is some concentration of ARAPs in rapidly developing urban, and adjacent suburban, communities. In general, these areas are more racially diverse than Tennessee as a whole. This concentration of ARAPs is due to economic forces beyond TDEC's control: Tennessee's cities are growing fast; that growth is associated with new construction; and that new construction is often associated with aquatic impacts. For example, there are a large number of ARAPs in Davidson County, home to Nashville, which is 65.5 percent White, 27.4 percent Black, and has a median household income of \$60,388. There are also many ARAPs in adjacent communities, particularly Williamson County, which is 88.2 percent White, 4.5 percent Black, and the wealthiest county in Tennessee, with a median household income of \$112,962.

Neither TDEC nor EPA nor any other state environmental agency can guarantee that environmental permits are issued in perfect proportionality to the racial, color, and national origin demographics of residents of each state. Developers will build new residential communities, or warehouses, or pipelines where there is economic demand for those activities. For the ARAP program, that demand is most concentrated in urban and suburban areas regardless of the underlying demographics, and that is where most ARAPs have been issued. With pipelines, along with economic demand, there is an additional layer: the simple fact that a pipeline must have a beginning and an end, and geographical, logistical, socioeconomic, and market forces will often have shaped, long before TDEC entered the picture, the demographics of communities surrounding the logical and feasible beginning and end of the pipeline.

¹⁵³ Ex. 3 - Dataset 1 (All ARAPs issued between 1.1.2011 and 6.30.2021).

b. TDEC had a substantial legitimate justification for issuing the Permit.

SELC has not demonstrated that the Permit would have resulted in a disproportionate impact to African Americans compared to either (1) other ARAPs issued for aquatic impacts associated with oil and gas pipelines, or (2) all other ARAPs. The Complaint is based solely on the fact that this one ARAP, viewed in isolation from all others, was located in community that is more African American than the state as a whole. Moreover, the Complaint is premised on potential environmental impacts that were not authorized by the Permit, including hypothetical impacts to the Memphis Sands Aquifer resulting from the operation of the Pipeline. Absent any demonstration of disproportionate impact, there is no need to demonstrate a substantial, legitimate justification for having issued the Permit.¹⁵⁴

Nonetheless, TDEC did have such a justification: the Permit complied with all applicable statutory and regulatory requirements, and was fully protective of the quality of waters of the state. The Permit, like other ARAPs, imposed conditions to minimize water quality impacts, and required compensatory mitigation to ensure no overall net loss of resource values. No activity the Permit authorized would have harmed residents of the Boxtown community, because the Permit did not authorize the Pipeline and the aquatic impacts were both minimal and offset in the same watershed. SELC does not allege—nor could it—that the Permit failed to protect waters of the state associated with the permitted impacts, or that the Permit was any less protective than ARAPs issued for comparable impacts in other communities across the state.

TDEC did not propose the Pipeline, nor did it authorize the pipeline. TDEC did not select the pipeline route. The only role TDEC had regarding the pipeline location was to ensure that this was the alternative with the least aquatic impacts just as it does for *every* individual ARAP application. Although SELC has alleged that Alternative 1 may have been a practicable alternative with fewer aquatic impacts, it also concedes that this route would impact low-income people of color.

Faced with an application that complied with the Act, the ARAP rules, and the Antidegradation Statement, TDEC treated it like any other such application, provided for an open and robust public process, and issued the Permit with extensive and protective conditions to protect water quality. To have denied the Permit based on SELC's unsupported claims of disparate impact would have been arbitrary and capricious, and any such decision would likely have been overturned on appeal.

¹⁵⁴ *Johnson*, 2008 U.S. Dist. LEXIS 59663, at *7-8.

II. TDEC has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to TDEC's services, programs, and activities, for individuals with limited English proficiency and individuals with disabilities, and has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.1.

TDEC has a robust program to ensure that all Tennesseans, including those with limited English proficiency, have meaningful access to TDEC's programs and services, free from discrimination.

TDEC receives numerous grants from the federal government, including from EPA, the Department of Energy (DOE), and the Department of the Interior (DOI), totaling tens of millions of dollars annually.¹⁵⁵ TDEC thus complies with Title VI, which states that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁵⁶ TDEC conducts its Title VI program in consultation with the Tennessee Human Rights Commission (THRC). THRC is charged with verifying that all Tennessee State governmental entities receiving federal financial assistance comply with Title VI pursuant to Tennessee Code Annotated section 4-21-203. Also, THRC is authorized to define and establish the components, guidelines, and objectives of a comprehensive state policy to ensure and promote present and future compliance with Title VI. THRC has officially approved TDEC's Title VI program, which is summarized below.

a. Title VI Coordinator and Title VI Complaint Coordinator

TDEC's Title VI Coordinator, Chris Pianta, leads its compliance efforts, in consultation with TDEC's Office of General Counsel (OGC). The Title VI Coordinator, housed in TDEC's Office of Policy and Sustainable Practices (OPSP), assists TDEC in promoting and achieving Title VI compliance, healthy and safe communities, and quality environmental education for the benefit of the environment, public health, and economy.¹⁵⁷ This position also supports TDEC's objectives of achieving environmental justice for all Tennesseans. The Title VI Coordinator's duties, relevant to this matter, include:

- Developing and implementing TDEC's Title VI and Environmental Justice Programs;
- Coordinating the Title VI and Environmental Justice Programs with all TDEC divisions and other program area managers or designees, including sub-recipients;
- Developing and facilitating Title VI training for TDEC staff and sub-recipients;

¹⁵⁵ Ex. 2, at 15, 69.

¹⁵⁶ 42 U.S.C. § 2000d.

¹⁵⁷ Ex. 2, at 12. OPSP is a TDEC office that supports the work of both TDEC Bureaus by assisting in the development of environmental policy and promoting sustainable practices in communities, the private sector, and government and institutions. OPSP distributes grants to sub-recipients.

- Developing and disseminating Title VI information to internal and external customers;
- Collaborating with TDEC staff and sub-recipients to promote and improve Title VI compliance and to resolve any deficiencies;
- Addressing Title VI complaints promptly;
- Engaging with EPA's Environmental Justice personnel and other state Environmental Justice Coordinators;
- Coordinating and implementing TDEC's LEP Program;
- Coordinating and facilitating LEP training for TDEC staff and LEP/Title VI Contacts;
- Troubleshooting with language and translation service providers to address TDEC staff concerns regarding accessing language services for LEP customers;
- Engaging and partnering with the communities potentially impacted by environmental justice to develop long-term connections with community organizations and historically underserved communities;
- Developing an Environmental Justice framework for TDEC; and
- Maintaining records of Title VI matters.¹⁵⁸

TDEC's Title VI Complaint Officer, Lawanda Johnson, is housed in TDEC's Division of Internal Audit.¹⁵⁹ The Title VI Complaint Officer's duties are:

- Investigating all Title VI complaints alleging Title VI discrimination by TDEC and/or its sub-recipients that are filed with the Department until resolution.
- Performing audits, including desk audits and on-site audits, of sub-recipients, including verification of Title VI compliance.
- Collaborating with the Title VI Coordinator to ensure the timely resolution and reporting of all Title VI complaints to the THRC and other pertinent compliance monitors.¹⁶⁰

b. Complaint Procedures

TDEC's Title VI complaint procedures, including where to access a complaint form and names of complaint contacts, are set forth in detail on its Title VI website.¹⁶¹

c. Title VI Notices, Informational Resources, and Public Outreach

TDEC's website is based on the State of Tennessee's standard webpage template (which cannot be changed by individual departments), which includes a link at the bottom to THRC's Title VI program page with the following notice:

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 13.

¹⁶⁰ *Id.*

¹⁶¹ https://www.tn.gov/content/dam/tn/environment/sustainable-practices/title-vi-and-environmental-justice/opsp_policy_title-vi_title-vi-complaint-process.pdf

The State of Tennessee complies with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), which states that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Any person who believes that discrimination has occurred by a state agency on the basis of race, color or national origin, including limited English proficiency (LEP), in violation of Title VI may file a written complaint with the Tennessee Human Rights Commission. Complaints must be filed within 180 days of the alleged discriminatory act. Complaints may also be filed with the state or federal agency involved, or the United States Department of Justice. For more information, please contact the Tennessee Human Rights Commission.¹⁶²

TDEC has the following notice displayed on its main Title VI page:

As the recipient of federal funds, TDEC is required to comply with Title VI of the Civil Rights Act of 1964 which says that TDEC may not discriminate on the basis of race, color, or national origin while providing services, benefits, or programs. Title VI includes two other requirements: providing language assistance to those who are limited English proficient (LEP) and supporting environmental justice.¹⁶³

TDEC has the following notice displayed on its homepage, on its permitting webpage, on its public participation webpage, and on its contact webpage:

TDEC does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of its programs or activities, and does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights. TDEC’s nondiscrimination coordinator, Chris Pianta, may be reached at TDEC.TitleVI@tn.gov.

If it is hard for you to read, speak, or understand English, please see our [Language Assistance webpage](#) for more information about our free language assistance services.¹⁶⁴

TDEC’s own main Title VI webpage features:

¹⁶² <https://www.tn.gov/humanrights/file-a-discrimination-complaint/title-vi/title-vi-disclaimer.html>

¹⁶³ <https://www.tn.gov/environment/program-areas/opsp-policy-and-sustainable-practices/opsp-title-vi-and-environmental-justice.html>

¹⁶⁴ <https://www.tn.gov/environment/permit-permits-home.html>; <https://www.tn.gov/environment/ppo-public-participation.html>; <https://www.tn.gov/environment/contacts.html>

- Links to informational resources such as a Title VI training, a Title VI brochure; a Title VI poster; and TDEC's strategy for board diversity;¹⁶⁵
- An overview of Title VI, along with Title VI resources for subrecipients and contractors, and an overview of environmental justice;¹⁶⁶
- A link to a Title VI FAQ page which addresses the following questions:
 - What is federal financial assistance?
 - What does Title VI prohibit?
 - When doesn't Title VI apply?
 - How does TDEC comply with Title VI?
 - What is Limited English Proficiency (LEP)? Can I get assistance from TDEC in my primary language?
 - Does Title VI apply to TDEC's grantees and sub-recipients?
 - I'm the recipient of a state-funded grant from TDEC; do I have to comply with Title VI requirements?
 - How do I achieve Title VI compliance as a contractor, sub-recipient, or grantee of TDEC?
 - Is Title VI training required?
 - What is environmental justice?
 - What do I do if I have suffered discrimination based on color, race, or national origin?¹⁶⁷

TDEC also has an FAQ page specific to environmental justice, which features answers to the following questions:

- What is Environmental Justice?
- What are TDEC's responsibilities related to environmental justice?
- What regulatory authority does TDEC have relating to environmental justice?
- How are local, state, or federal agencies or authorities involved in matters relating to environmental justice?¹⁶⁸

TDEC maintains an Office of Communications ("Communications") and an Office of External Affairs (OEA). These offices actively engage the public and the media regarding TDEC programs and services. TDEC has developed a public participation toolkit to be utilized by its program divisions to promote public engagement.¹⁶⁹

¹⁶⁵ <https://tdec.tn.gov/title6/index.html>; https://www.tn.gov/content/dam/tn/environment/sustainable-practices/title-vi-and-environmental-justice/opsp_titlevi_brochure.pdf; https://www.tn.gov/content/dam/tn/environment/sustainable-practices/title-vi-and-environmental-justice/opsp_titlevi_poster.pdf; https://www.tn.gov/content/dam/tn/environment/sustainable-practices/title-vi-and-environmental-justice/Strategy_for_Board_Diversity.pdf

¹⁶⁶ <https://www.tn.gov/environment/program-areas/opsp-policy-and-sustainable-practices/opsp-title-vi-and-environmental-justice.html>

¹⁶⁷ <https://www.tn.gov/environment/program-areas/opsp-policy-and-sustainable-practices/opsp-title-vi-and-environmental-justice/policy-title-vi-faqs.html>

¹⁶⁸ <https://www.tn.gov/environment/program-areas/opsp-policy-and-sustainable-practices/opsp-title-vi-and-environmental-justice/environmental-justice-faqs.html>

¹⁶⁹ Ex. 2 at 44.

Communications provides communications services for TDEC in the form of traditional media communications, digital media communications, and internal communications. The Communications team makes information available to minority audiences via news media, social media, and e-newsletters. Communications regularly sends out information about TDEC programs and services to the following publications/groups:

- La Noticia, Nashville, Davidson County
- The Urban Journal, Nashville, Davidson County
- La Prensa Latina, Memphis, Shelby County
- Tri-State Defender, Memphis, Shelby County
- El Paisano, McMinnville, Warren County
- La Campana, Franklin, Williamson County
- Nashville Pride, Nashville, Davidson County¹⁷⁰

TDEC also hosts webpages for “Permits” associated with each program division that handles permits and a webpage entitled “Public Participation Opportunities,” which provides links to the different types of public participation opportunities available to beneficiaries and stakeholders such as permits, notices, and hearings. The homepages for both “Permits” and “Public Participation Opportunities” include TDEC’s notice of language assistance and link to TDEC’s Language Assistance webpage to support engagement of LEP customers.¹⁷¹

d. Monitoring and Data Collection

Each grant- and loan-administering program within TDEC is responsible for ensuring the compliance of the sub-recipients, through surveys, audits, and/or monitoring, as Title VI requires. To that end, each division and field office has an LEP/Title VI Contact, who facilitates training compliance, and language assistance services for the division and maintains information about participants in engagement activities.

TDEC collects data regarding the beneficiaries of its services and the agency’s staff through the use of census data, internal division collection of data from beneficiaries and sub-recipients, TDEC’s Office of People and Organizational Development’s review of data from TDEC employees, Procurement’s analysis of vendors, beneficiaries, contractors, and sub-recipients, and internal and external customer service surveys.¹⁷²

One objective of TDEC’s data collection is identifying the impact and participation of protected groups in environmental and conservation programs.¹⁷³ Analysis of this data allows TDEC to evaluate current inclusion of traditionally underrepresented groups and identify opportunities for greater participation.¹⁷⁴

¹⁷⁰ *Id.* at 45.

¹⁷¹ *Id.* at 44.

¹⁷² *Id.* at 16.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

e. LEP

As part of TDEC's ongoing self-evaluation and continued efforts to strengthen Title VI compliance and provide excellent customer service to all beneficiaries, it works to break down barriers that LEP individuals may encounter in their experiences with TDEC.¹⁷⁵

TDEC assists LEP individuals by providing a notice of language assistance and language assistance webpage; by posting "I Speak" cards at field offices and parks; and by utilizing LEP/Title VI Contacts in each division, field office, and state park to support LEP individuals.¹⁷⁶ Christa Morpew is the LEP/Title VI contact for DWR and Stephanie Richey is the LEP/Title VI contact for TDEC's Memphis Environmental Field Office. The LEP/Title VI contacts are equipped with TDEC's current LEP Policy and Procedure as well as a fillable LEP log, TDEC's account information for accessing language assistance services, the names and contact information of TDEC bilingual staff, an inventory of all division documents in languages other than English, "I Speak" cards and posters, an informational power point to use to train staff, and application forms to open accounts with language service providers.¹⁷⁷

TDEC's written LEP Policy and Procedures, accessible to the public on TDEC's website, provides guidance to staff in assisting LEP individuals.¹⁷⁸ This policy gives detailed instructions on how to:

- Identify an LEP individual and the language they speak;
- When to offer free LEP services;
- How to obtain a qualified interpreter;
- What to do if a qualified interpreter cannot be reached during the initial encounter.¹⁷⁹

TDEC uses AVAZA Language Services Corp. (AVAZA) and Linguistica International (Linguistica) to provide free telephonic interpretive and document translation services.¹⁸⁰ TDEC will also use competent and qualified bilingual staff as translators.¹⁸¹ TDEC regularly maintains selected documents in Spanish, Arabic, Chinese, Hindi, Korean, Kurdish, and Vietnamese.¹⁸²

To support LEP customer access to TDEC's programs, services, and benefits, the TDEC homepage and each division homepage—Air, Archaeology, Energy, Geology, Natural Areas, Policy and Sustainable Practices, Radiation, Recreation Services, Small Business Environmental Assistance, Solid Waste, State Parks, Underground Storage Tanks, and DWR—hosts a notice that TDEC provides free language assistance to LEP customers at the bottom of the main body of the homepage.

¹⁷⁵ *Id.* at 25.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 25-26.

¹⁷⁸ Ex. 7 - TDEC LEP Policy and Procedures, at 1-7;

<https://www.tn.gov/content/dam/tn/environment/policy/documents/LEP%20Policy%20and%20Procedures.pdf>

¹⁷⁹ *Id.* at 2-4.

¹⁸⁰ *Id.* at 3-4.

¹⁸¹ *Id.* at 3.

¹⁸² Ex. 2 at 27-28.

This same notice is also posted on the homepages for Permits and for Public Participation. The notice links to the Language Assistance webpage, which provides contact information, including name, email address, and phone number, for obtaining language assistance from different divisions.¹⁸³ The Language Assistance webpage also provides its notice of free language assistance for LEP customers in Spanish, Mandarin, Vietnamese, Hindi, and Korean, languages most frequently encountered by staff.¹⁸⁴

f. Title VI Training

TDEC's Title VI training assists personnel and sub-recipients in complying with and carrying out departmental policies and federal regulations pertaining to Title VI in their daily activities.¹⁸⁵ The training provides comprehensive information on Title VI provisions, the TDEC Title VI Program, recipient and sub-recipient responsibilities and requirements, handling and processing complaints of discrimination, strategies to prevent discrimination in TDEC programs and activities, and the importance and scope of environmental justice and public participation.¹⁸⁶ TDEC staff complete Title VI Training through an online self-guided training module, available on-demand and year-round.¹⁸⁷ All TDEC staff are automatically enrolled in the annual Title VI training, which is made available each year and must be completed by the end of each fiscal year.¹⁸⁸

To receive a certificate of completion, staff must achieve a score of 80 percent.¹⁸⁹ If staff fail to attain a score of 80 percent or higher on the quiz, then they must re-take the training module.¹⁹⁰ Once staff have satisfactorily completed the training, the training module produces a Certificate of Completion, with the applicant's name, affiliation, and date of training.¹⁹¹ During fiscal year 2020-21, 94.87 percent of full-time TDEC staff completed training. TDEC sub-recipients are provided on-demand and year-round access to the online training module through the TDEC external website.¹⁹²

g. Sub-recipient Compliance

TDEC administers grants and loans to sub-recipients through several TDEC divisions: Air Pollution Control (APC), the Office of Energy Programs (OEP), Materials Management in the Division of Solid Waste Management (DSWM), Recreation Education Services (RES), the Office of Policy and Sustainable Practices (OPSP), the State Revolving Loan Fund (SRF), DWR, and the

¹⁸³ <https://www.tn.gov/environment/contacts/language-assistance.html>

¹⁸⁴ <https://www.tn.gov/environment/contacts/language-assistance.html>

¹⁸⁵ Ex. 2 at 32. The online training is accessible here: <https://tdec.tn.gov/title6/index.html>

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

Tennessee Historical Commission (THC).¹⁹³ Each division is responsible for monitoring its sub-recipients.¹⁹⁴

TDEC requires its sub-recipients to complete a Title VI pre-audit survey upon submission of an application for funding.¹⁹⁵ This survey must be completed and returned to the grant or loan administering program as part of the application for funding.¹⁹⁶ Among other items, the pre-audit survey requires submission of the sub-recipients written policy of nondiscrimination, LEP plan, Title VI training program, and process and procedure for reviewing Title VI complaints.¹⁹⁷ To support sub-recipients in developing Title VI compliant materials, TDEC makes available its own Title VI policy, poster, complaint process, LEP policy and procedure, and Title VI online training for the use and adoption of sub-recipients.¹⁹⁸ These materials are available on TDEC's Title VI website.¹⁹⁹

Each grant and loan administering program requires contractual assurances from its sub-recipients.²⁰⁰ Specifically, the following provisions are included in all sub-recipient grant contracts:

Nondiscrimination. The Grantee agrees that no person shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in the performance of this Grant Contract or in the employment practices of the Grantee on the grounds of handicap or disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, Tennessee State constitutional, or statutory law. The Grantee shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.

Records. The Grantee and any approved subcontractor shall maintain documentation for all charges under this Grant Contract. The books, records, and documents of the Grantee and any approved subcontractor, insofar as they relate to work performed or money received under this Grant Contract, shall be maintained for a period of five (5) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the Grantor State Agency, the Comptroller of the Treasury, or their duly appointed representatives.²⁰¹

Post-award monitoring is undertaken by the grant and loan administering programs with additional audits by the Division of Internal Audit. OEP, OPSP, DSWM, RES, and SRF engage in

¹⁹³ *Id.* at 35. THC is administratively attached to TDEC and not part of the department. For example, TDEC's Commissioner does not hire THC staff.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ <https://www.tn.gov/environment/program-areas/opsp-policy-and-sustainable-practices/opsp-title-vi-and-environmental-justice.html>

²⁰⁰ Ex. 2 at 35.

²⁰¹ *Id.*

on-site monitoring of sub-recipients during the grant term.²⁰² Also, all grant programs require submission of evidence of completion of sub-recipient Title VI training after the grant or loan is awarded, but before reimbursement or disbursement of funds under the grant or loan.²⁰³

TDEC's Division of Internal Audit is tasked with auditing grants.²⁰⁴ If an audit reflects non-compliance with Title VI, the Title VI Coordinator or the appropriate division's grant administrator follows up with the sub-recipient to make the sub-recipient aware of the Title VI resources made available by TDEC for sub-recipients' use and customization.²⁰⁵ Each division director is responsible for making sure corrective action is taken by the sub-recipient. TDEC did not have any agency sub-recipients or contractors found in noncompliance with Title VI by another state or federal agency during the past fiscal year.²⁰⁶

CONCLUSION

For the reasons discussed above, TDEC respectfully requests that ECRCO return preliminary findings that TDEC did not violate Title VI in its issuance of the Permit and that TDEC has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7. If you have any questions or require any further information, please do not hesitate to contact me.

Sincerely,



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²⁰² *Id.* at 36.

²⁰³ *Id.*

²⁰⁴ *Id.* at 37.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

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Attachments:

- Ex. 1 - Byhalia Permit Documents
- Ex. 2 - TDEC Title VI Compliance Report and Implementation Plan Fiscal Year 2019-2020 (rev. Feb. 2021)
- Ex. 3 - Dataset 1 (All ARAPs issued between 1.1.2011 and 6.30.2021)
- Ex. 4 - Dataset 2 (All IPs issued between 1.1.2011 and 6.30.2021)
- Ex. 5 - Dataset 3 (All GPs issued between 1.1.2011 and 6.30.2021)
- Ex. 6 - Dataset 4 (Pipeline IPs)
- Ex. 7 - TDEC LEP Policy and Procedures